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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Petitioners,

—v.—

PUBLIC UTILITY DISTRICT NO. 1 OF
BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

OREGON PUDs' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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April 5, 1985

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QUESTIONS PRESENTED

1. Did the Washington Supreme Court retroactively manipulate state law in a sudden, unjustified and arbitrary departure from all precedent to redefine state law remedies and rights, causing an unconstitutional taking of property rights, when it invalidated municipal contracts which circumvented existing enabling statutes incorporating public protections against the very liabilities incurred?

2. Did the Washington Supreme Court deny Petitioners notice and opportunity to protect their rights, when, without a factual hearing, it made rulings as a matter of law based upon the plain terms of a contract?

3. Did the Washington Supreme Court deny Petitioners an impartial forum because two justices (one in the majority and one in the dissent) lived in areas serviced by utilities involved in the proceedings?

PARTIES TO THE PROCEEDINGS

The Petition for Certiorari sets forth the numerous parties to this proceeding. This Brief in Opposition to Petition for Certiorari is submitted by Respondents Central Lincoln People's Utility District, Clatskanie People's Utility District, Northern Wasco County People's Utility District and Tillamook People's Utility District (referred to in proceedings below and herein as "the Oregon PUDs").

None of the four Oregon PUDs has any subsidiaries or other affiliates. The Oregon PUDs are unaware of any subsidiaries or other affiliates of other parties.

STATEMENT OF THE CASE

The Oregon PUDs generally adopt the Statement of the Case of the Nine Defendants' Brief in Opposition to Petition for Certiorari, with the following additions.

Petitioners lump all respondent participants together. To the contrary, the participants are 88 separate and distinct utilities with differing interests, relationships and positions. The four Oregon PUDs are not, have never been, and cannot under Oregon law become members of the Washington Public Power Supply System (hereinafter "Supply System"). Nor, contrary to Petitioners' unilateral assertions, have they authorized the Supply System to act as their agent in connection with the Supply System's Nuclear Projects 4 and 5. Their relationship with the Supply System in these projects, as was the case with a number of other respondents, was simply that which was created by the terms of the now void Participants' Agreements with the Supply System in which they were to purchase a percentage of the project capability of the plants to be owned, financed and constructed by the Supply System.

Likewise, the Oregon PUDs did not "supervise" the Supply System's construction and expenditure of funds as asserted by Petitioners. As noted by the Washington Supreme Court and the Oregon Supreme Court as well, the participants, as purchasers of project capability from the plants, were afforded only limited rights on Supply System proposals on specified subjects. If within 15 days 20 percent or more of the participants (by percentage share of project capability purchased) determined that the Supply System proposal did not comport with "prudent utility practice," they could object and have an independent consultant determine if indeed the Supply System proposal departed from prudent utility practice.[1] No participant, and not even a group of participants acting collectively, if their total shares represented less than 20 percent of the project capability purchased,[2] could object to a Supply System proposal even if, in its opinion, the proposal did not comply with prudent utility practice. And proposals by the Supply System within the parameters of prudent utility practice could not be objected to by one or even all 88 of the participants, even if some or all of the participants would have, if they were the project owners,

[1] The consultant could not adopt a Participants' proposal even if he determined the Participants' proposal was preferable unless he determined that the Supply System violated prudent utility practice. Participants' Agreements, § 15(f).

[2] Even collectively, the Oregon PUDs represented only approximately four percent of the project capability purchased.

selected another approach for efficiency, safety or any other reasons. The Supply System independently had the right to control the details of the work, to hire and fire its employees and consultants, and to operate as a separate and distinct entity free of supervision and management by the Oregon PUDs.

One also might get the impression from the Petition that the first case filed to challenge the authority and obligations of any participants in the projects was filed by certain cooperatives after the Supply System terminated construction of Nuclear Projects 4 and 5. That is not so. Prior to termination of the projects, an Oregon ratepayer filed an action in Oregon state court contesting the authority of his utility to enter into its Participant's Agreement with the Supply System. (*DeFazio v. Washington Power Supply System, et al.*, No. 16-18-11344, Circuit Court for Lane County, Oregon, filed December 22, 1981). That ratepayer litigation raised issues common to all the Oregon municipal and PUD participants, necessitating their intervention in the litigation. Additional ratepayer groups also intervened.

Prior to the Washington Supreme Court's first ruling on the authority of Washington municipalities and PUDs to enter into their Participants' Agreements with the Supply System, the *DeFazio* litigation resulted in a trial court ruling that the Oregon PUDs and other Oregon municipal entities lacked authority to enter into their Participants' Agreements with the Supply System, and that those Agreements were void *ab initio*. The Oregon Supreme Court subsequently reversed that trial court ruling in *DeFazio v. Washington Public Power Supply System*, 296 Or. 550, 679 P.2d 1316 (1984) (Appendix G to the Petition for Certiorari), a decision applauded by Petitioners.

Interestingly, the decision by the Oregon Supreme Court that the Oregon public participants had authority to enter into the Participants' Agreements with the Supply System was premised on a number of legal conclusions that directly contradict positions now adopted by Petitioners in their attempt to create federal constitutional issues in this case. For example, Petitioners now contend that the Supply System was merely the

"participants' instrumentality," and that the participants "acted through the Supply System," which was merely a conduit for them. (See, e.g., Petition for Certiorari at 4-5). If so, then the Oregon public participants would have lacked authority. *See DeFazio v. Washington Public Power Supply System* (Appendix G to the Petition for Certiorari at G-15-19). The Oregon Supreme Court, however, concluded as a matter of law that the Supply System was not an instrumentality or conduit of the Oregon public participants. Also directly contrary to assertions now made by Petitioners, the Oregon Supreme Court rejected as a matter of law arguments that the Oregon entities were issuers of bonds or borrowers of funds, directly or indirectly, in connection with Projects 4 and 5 (G-43), and that the Oregon entities managed and controlled the Supply System (G-19). These legal conclusions by the Oregon Supreme Court were essential to its decision, which was certainly embraced by Petitioners, and Petitioners cannot now disregard those rulings to argue that the Washington Supreme Court was arbitrary in reaching the same legal conclusions.

Petitioners further suggest, without support, that while bondholders did bear some risks, *e.g.*, insolvency, they did not bear the risk that the contracts between Participants and the Supply System were *ultra vires* and void. As discussed further herein, that bold assertion is simply contrary to all law on the subject and flies in the face of the very essence of the *ultra vires* doctrine with respect to public contracts. Indeed, the Official Statements and the bonds themselves warned potential bondholders that enforceability of the Participants' Agreements may be subject to "judicial discretion,"[3] and bond counsel was retained to render

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[3] The Official Statements prior to the 1979B series warned that "the obligations of the parties to said Participants' Agreement. . . and the enforceability thereof under the same may be subject to general principles of equity which permit the exercise of judicial discretion and to valid bankruptcy, insolvency, reorganization, moratorium and other laws for the relief of debtors."

In the Official Statement for the 1979B series and thereafter, bond purchasers were warned that enforceability of the Participants' Agreement was subject to "judicial discretion, the valid exercise of sovereign police powers of the State of Washington, and of the constitutional powers of the United States of America, and valid bankruptcy, insolvency, reorganization, moratorium and other laws affecting creditors' rights."

The same warning appeared on the bonds themselves.

an opinion to prospective bond purchasers on the authority of the participants. The law and facts both belie Petitioners' unsupported assertion.

Petitioners assert that the type of financing used here has become an accepted means of financing projects such as this. They neglect to mention, of course, the fact that other states utilizing this financing method have adopted very particular enabling statutes geared to that specific type of financing.[4] Washington has no such enabling statute.

Finally, Petitioners mischaracterize the Washington Supreme Court's decision. Many of the inaccurate characterizations will be dealt with below. In particular, Petitioners assert that to their detriment the Washington Supreme Court fabricated a new "control test" for determining authority. Actually, the "control" test articulated by the Washington Supreme Court was an expansion of existing law to Petitioners' benefit. Having concluded that it had never before expanded municipal authority

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[4] As the Washington court noted in *Chemical Bank I:*

Some states have provided statutory authority for such unconditional guaranties and courts have recognized the validity of projects developed under those provisions. *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 287 S.E.2d 476 (1982). That recognition, however, is based upon very explicit statutory authority. South Carolina's "Joint Municipal Electric Power and Energy Act" provides an example:

> Any municipality which is a member of the joint agency may contract to buy from the joint agency power and energy required for its present or future requirements, including the capacity and output of one or more specified projects. As the creation of a joint agency is an alternative method whereby a municipality may obtain the benefits and assume the responsibilities of ownership in a project, *any such contract may provide that the municipality so contracting shall be obligated to make the payments required by the contract whether or not a project is completed, operable or operating notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of a project or the power and energy contracted for,* and that such payments under the contract shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance or nonperformance of the joint agency or any other member of the joint agency under the contract or any other instrument.

(Italics ours.) S.C. Code Ann. § 6-23-110 (Law Co-op. Supp. 1982). Several other states have similar statutes. Mass. Ann. Laws, ch. 164A, § 3(b) (Law. Co-op. 1979); Me. Rev. Stat. Ann., tit. 35, § 4103(1)(B) (Supp. 1982); N.C. Gen. Stat. § 159B-12 (1982); Va. Code § 15.1-1611 (1981); Vt. Stat. Ann., tit. 30, § 604 (Supp. 1982). This state has no such statute.

Chemical Bank v. Washington Public Power Supply System, 99 Wash. 2d 772, 786, 666 P.2d 329 (1983) ("Chemical Bank I")

for this type of transaction beyond situations where *actual* ownership existed, the Washington Supreme Court then expanded those parameters of municipal authority to include situations where participants had all the *rights of control* incident to ownership. Petitioners also claim the Washington Supreme Court treated the "control" issue as a factual one. It is clear from the face of the opinion itself that the test was one of a legal *right* of control under the terms of the agreements. Indeed, only such a legal test based upon the *right* of control could be applied at the time a municipal contract is entered into. The court then determined as a matter of law from the plain terms of the agreement that participants were not given the legal rights of control that would be incident to ownership of the Projects.

REASONS FOR DENYING THE PETITION

Petitioners ask this Court to grant certiorari to review certain rulings by the Washington Supreme Court under Washington law. The Washington Supreme Court ruled that agreements between the Supply System and 88 public and cooperative utilities were void and unenforceable against the Washington cities and utility districts under the state's *ultra vires* doctrine, and that, as a result, the agreements were also unenforceable against the rest of the participants under state contract law principles of mutual mistake and frustration of purpose. Petitioners claim these rulings by the Washington Supreme Court constituted a "taking" of property without just compensation and denied them procedural due process.

In evaluating whether the petition raises any significant federal constitutional questions, it is important to keep in close perspective just how petitioners even purport to raise federal constitutional questions in the context of these purely state law issues.

At times, it appears that Petitioners attempt to challenge the constitutionality of a state court's voidance of a municipal contract by application of the time-honored *ultra vires* doctrine, or by application of contract principles of mutual mistake and frustration of purpose. They certainly devote considerable effort to attempt to influence this Court that it would be unfair

in any such circumstances to deprive the bondholders of their investment.[5] And they recite by rote factors articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 499 U.S. 155 (1980), as if these factors would apply to judicial decisions interpreting these basic concepts of municipal and contract law. However, a closer reading of their Petition reveals that technically they couch their constitutional argument in other terms, as indeed they must. Their constitutional claims hinge on whether the Washington Supreme Court suddenly and arbitrarily departed from clear precedent to redefine contract rights and remedies under state law, or whether the Washington Supreme Court unconstitutionally denied them a factual hearing or an impartial forum.

They must so frame their constitutional arguments for obvious reasons. The doctrines of *ultra vires*, mutual mistake and frustration of purpose are principles of municipal and contract law long accepted and embodied in every contract with a municipal entity.[6] Therefore, the fact that municipal contracts

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[5] For example, Petitioners discuss the cost of power in the Northwest and attempt to characterize the bondholders as a group of individuals with small investments for retirement income. *See* Petition for Certiorari at 8n.4 & 9. These assertions have no purpose in the petition other than to attempt to influence this court to rule on the petition on bases other than the claimed constitutional issues involved.

[6] This Court has long recognized that purchasers of municipal bonds

> "Are charged with notice of the laws of the state granting power to make the bonds that they find on the market. This we have always held. If the power exists in the municipality the bona fide holder is protected against mere irregularities in the manner of its execution; but if there is a want of power no legal liability can be created."

Northern National Bank v. Trustees of Porter Township, 110, U.S. 608, 618 (1884), quoting *Anthony v. County of Jasper*, 101 U.S. 697 (1880); *Accord Barnett v. City of Denison*, 145 U.S. 135, 139 (1892); *Moore v. City of Nampa*, 276 U.S. 536, 541 (1928).

This is certainly the law in Washington, *Minish v. Hanson*, 64 Wash. 2d 113, 390 P.2d 704 (1964); *Noel v. Cole*, 98 Wash. 2d 375, 379, 655 P.2d 245, 248 (1982), and throughout the field of municipal law. *See* 10 McQuillin, *The Law of Municipal Corporations*, §§ 29.04, 29.104c (3d ed. 1981). RCW 62A (UCC) § 8-202, Comment at ¶ 6. *See also*, 1 *Williston on Contracts*, § 220B (3d. ed. 1957):

> Holders of municipal bonds are held in law to know, and are chargeable with constructive knowledge of, constitutional and statutory provisons bearing on the authority to issue bonds. Therefore, though negotiable in form, such bonds are subject to certain defenses, as for instance that the issue is *ultra vires* and therefore void even in the hands of an innocent holder.

may be voided by a state's court under state law does not itself raise any constitutional issue. And here in particular, the fact alone that bondholders lost most of their money invested in revenue bonds because the issuer (the Supply System) did not obtain the expected operating revenues from invalidated and unenforceable project agreements simply does not raise a constitutional issue, no matter how much money may be involved. Perhaps for this reason Petitioners never even raised a constitutional question in the state court proceedings (although defenses of *ultra vires*, mutual mistake and frustration of purpose were raised in numerous respondents' answers and counterclaims) until *after* the Washington Supreme Court decided that the Washington cities and PUDs lacked authority.

Moreover, Petitioners cite no case which would apply by rote the factors articulated in *Penn Central* and *Webb's* to a judicial decision interpreting close and unresolved issues of state contract law to determine that the decision amounted to an unconstitutional "taking" of "property." Rather, the cases relied on by petitioners involve confiscation or restriction of the use of property in contravention of prior and clearly established property rights.

If any constitutional issue were involved here at all, it could not be based on the fact that a state court, through application of state municipal and contract law, invalidated municipal contracts. Petitioners must argue that the state court did not apply state law, but invalidated the contracts and denied them all legal and equitable relief by manipulating and deviating from established state law to redefine suddenly and arbitrarily Petitioners' rights and remedies, or by deciding disputed questions of fact without a hearing. That is the argument they have to make. And in order to make it here, they have to mischaracterize the Washington Supreme Court opinions. A reading of the opinions alone demonstrates that no substantial federal question is raised.

THE WASHINGTON SUPREME COURT DID NOT "TAKE" PROPERTY RIGHTS OR DENY PROCEDURAL DUE PROCESS

1. *The Washington Supreme Court's Decision Did Not Manipulate State Law and Retroactively Depart from All Precedent to Arbitrarily Redefine Pre-Existing Property Rights.*

Admittedly, the authority issues presented for decision by the Washington Supreme Court were close and difficult legal issues. As is frequently the case in our complex legal system, attorneys (and judges) could and did disagree on what should be the outcome. But the fact that a case presents a close question of application of existing principles of law to new and unique factual circumstances does not mean that the losing side of the case is unconstitutionally denied property rights. If that were the case, this Court would be besieged with petitions for certiorari every time a state court decided a close case or case of first impression.

At best for Petitioners, it could be said that prior to the ruling by the state court on the issue, the authority of the Washington public participants was inconclusive. Petitioners seem to seek some solace or claim some constitutional protection by reason of the Respondents' belief that they had authority to enter into the Participants Agreements. However, it is hard to conceive that a municipality would enter into a transaction thinking it lacked authority.[7] Surely in virtually every instance in which the *ultra vires* doctrine has been applied to void municipal contracts, the municipal officials believed and represented, either expressly or impliedly, that they were entering into valid contracts. That belief is irrelevant to the question of whether in fact they had authority to do what they did. Under the *ultra vires* doctrine, the public interest demands that the public not be

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[7] Petitioner Chemical Bank and a class of bondholders seem to be making precisely this contention in their federal securities action instituted against respondents and others. *In Re Washington Public Power Supply System Securities Litigation*, MDL No. 551 (W.D. Wash., consolidated and transferred August 5, 1983). Although these respondents deny that Chemical and the class of bondholders have stated a claim and believe there is no merit whatever to such allegations, the federal securities action would be the proper forum to pursue these claims of misrepresentation. Such allegations have nothing to do with whether a constitutional question is raised here.

bound or subject to contractual liability for acts of municipal officials in excess of their authority.[8] If the public were so bound, the *ultra vires* doctrine would be meaningless and the public defenseless.

A review of the Washington Court's decisions in *Chemical Bank I* and *Chemical Bank II* reveals that the legal issues, although perhaps close and difficult, were carefully analyzed by the court in view of the applicable statutes and case law and the unambiguous provisions of the Participants' Agreements. Although the court's decisions may have displeased Petitioners and others, they have no basis whatever for asserting that the decisions retroactively redefined their property rights.

In *Chemical Bank I* a Washington court was asked to decide whether the Participants' Agreements were within the statutory authority of the Washington participants. *Chemical Bank v. Washington Public Power Supply System*, 99 Wash. 2d 772, 781, 666 P.2d 329 (1983) ("Chemical Bank I"). The court's analysis of the validity of the agreements was based upon an examination of Washington statutes authorizing the purchase of electricity, the acquisition or construction of generating facilities, joint operating agencies and joint development of energy generating projects. 99 Wash. 2d at 782. The court first examined statutes authorizing Washington cities and utility districts to buy electricity, and found that the Participants' Agreements were not simply an authorized purchase of electricity because they provided for an unconditional obligation to pay even if no electricity was ever produced. 99 Wash. 2d at 784. The court then examined statutes permitting municipalities to build or buy their own plants, and found that such statutes required an ownership interest and all the rights and protections incident to ownership. 99 Wash. 2d at 785. The court acknowledged that some states provide explicit statutory authority to purchase energy capacity whether or not energy is produced, 99 Wash. 2d at 786, but noted that the Washington legislature had never

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[8] The purpose of the *ultra vires* doctrine as applied to governmental actions is to "protect the citizens and taxpayers... from unjust, ill-considered or extortionate contracts, or those showing favoritism." *Noel v. Cole*, 98 Wash. 2d 375, 378-9, 655 P.2d 245 (1982), *quoting* 10 E. McQuillin, *Municipal Corporations*, § 29.02 at 200 (rev. 3d ed. 1981).

granted such express authority, and further noted that the Washington court had never found such authority when the municipalities did not have an ownership interest. 99 Wash. 2d at 785. Although the court could have determined that the absence of any ownership interest automatically made the Agreements unauthorized, it instead considered whether the Agreements could be authorized under the statutes permitting utilities to build or buy their own plants, if the Agreements provided for "sufficient control over the project to constitute the equivalent of an ownership interest." 99 Wash. 2d at 787. However, the court concluded that "several provisions of the agreement limit the participants' role in management to an extent inconsistent with control of any facilities acquired or constructed." *Id.*

The court next considered statutes permitting the creation of joint operating agencies such as the Supply System, and found that the statutes did not provide for the purchase of electric energy that may not be generated. 99 Wash. 2d at 794. Lastly, the court considered statutes permitting public entities to enter into agreements for joint development of generating facilities, but found that these statutes explicitly required that such entities would have an actual ownership interest in any facility built. 99 Wash. 2d 772.[9]

The Washington court concluded that the participants lacked authority to enter into the Agreements because the Agreements were an elaborate financing arrangement that circumvented the protection provided to the public in existing statutory schemes, stating:

> In the present case, the participants lacked substantive authority to enter into this type of contract because they constructed an elaborate financing arrangement that required the participants to guarantee bond payments irrespective of whether the plant was ever completed; to sur-

[9] The court also considered Petitioners' argument that the Agreements were authorized by the implied powers of municipalities, but rejected that argument based upon Washington law that municipal corporations' powers are limited to those conferred in express terms or those necessarily implied, so that if there is any doubt about a claimed grant of power it must be denied. 99 Wash. 2d at 782.

> render ownership interest and considerable control to WPPSS; and to assume the obligations of defaulting participants. As such, these contracts failed to protect unsuspecting individuals, the ratepayers, represented by the participants. *By choosing such an alternative arrangement in lieu of a statutory scheme that incorporated protections against those very liabilities, the participants exceeded their statutory authority, rendering the contracts* ultra vires.

99 Wash. 2d at 798. (Emphasis added.)

In *Chemical Bank II* the Washington court sustained the trial court's ruling upon remand from *Chemical Bank I* that the lack of authority of Washington participants vitiated the Agreements under the doctrines of mutual mistake and frustration of purpose, and that restitution was unavailable from participants because they received no benefit. *Chemical Bank v. Washington Public Power Supply System*, 102 Wash. 2d 874, 691 P.2d 524 (1984) ("Chemical Bank II"). A review of the court's decision in *Chemical Bank II* reveals that the opinion was also based upon careful application of existing Washington law to the facts of the case.

In *Chemical Bank II*, the Washington court denied Petitioners' claim for restitution from the participants on the grounds that the participants had received no benefit from the bondholders in connection with participants' agreements with the Supply System. While Petitioners attempt to characterize this ruling as an unforseeable and unjustifiable interpretation of state law, they apparently do not deny that Washington law does not permit restitution from a party which does not receive tangible benefits. *See Hailey v. King County*, 21 Wash. 2d 53, 57, 149 P.2d 823 (1944); *Klinke v. Famous Recipe Fried Chicken Inc.*, 24 Wash. App. 202, 215, 600 P.2d 1034 (1978), *aff'd in part, rev'd in part on other grounds*, 94 Wash. 2d 255, 616 P.2d 644 (1980). Rather, Petitioners rely on the dissent's argument that "it was for the participants' benefit that the plants were being built in the first place." Petition for Certiorari at 20, *quoting Chemical Bank II*, 102 Wash. 2d at 936 (Utter, J., dissenting). In fact, however, any benefit to the participants was at most

intangible and merely anticipatory, and never realized.[10] Respondents had no ownership interest in any tangible benefit provided to the Supply System by the bondholders. Their agreement entitled them only to the provision of electricity, and no electricity has been, or will be, provided. Anticipated benefit to the participants which never materialized cannot be made the basis for restitution, *see Restatement (Second) of Contracts*, § 370, Comment a, Illustration 2, nor can participants be required to "disgorge the benefit" they never received. *See Restatement (Second) of Contracts*, § 344, Comment a (1981).[11]

While Petitioners (and the dissent) might disagree that no tangible benefit was received by participants, the court was required to and did make that ruling in accord with state law. It is, at best, fanciful to suggest that the court's finding that no tangible benefit was received by the participants amounts to a redefinition of the Petitioners' property rights under state law.

Petitioners also contend, in a footnote, that the Court's ruling that the lack of authority of the Washington entities voided the remaining participants' contracts due to mutual mistake and frustration of purpose was a "similar attempt to manipulate state law." Petition for Certiorari at 4n.14. Petitioners base this contention on their own opinion that the participants were not "adversely affected" by the mistake and that the agreements exhibited a "contrary intention" to permitting frustration of purpose because Section 6(d) of the Participants' Agreements provides that payment shall be made "whether or not other participants performed their obligations under the agreement." Petition for Certiorari at 21n.14.

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[10] The Supply System, on the other hand, received tangible funds from the bondholders, and converted those funds into tangible assets. The Bond Resolution gives the bondholders the contractual right to restitution of the Supply System's Project 4 and 5 assets. Petitioner Chemical Bank, acting under the Bond Resolution, has in fact seized Project 4 and 5 funds, and has the right to take control of Project 4 and 5 assets.

[11] Not surprisingly, in seeking to require participants to disgorge a benefit they never received Petitioners advance a theory of restitution that would vitiate the *ultra vires* doctrine. If the opportunity to receive a future tangible benefit required restitution of the value of that opportunity, payment of restitution would be required in the amount of the market value of the opportunity, *i.e.*, the amount the participants agreed to pay under the *ultra vires* Agreements. Such a theory of restitution would, of course, make it impossible to protect the public by refusing to enforce an *ultra vires* agreement. *See Hailey v. King County*, 21 Wn. 2d at 57.

Petitioners' argument is contradicted by Section 6(d), which provides:

> Such payments . . . shall not be conditioned upon the performance or non-performance by Supply System or any other Participant or entity under this or any other agreement or instrument, the remedy for any non-performance being limited to mandamus, specific performance or other legal or equitable remedy.

Section 6(d) provides only that payment shall not be conditioned upon non-performance by another participant "under this agreement." It does *not* provide that payment shall not be conditioned upon the enforceability of the Agreements. In fact, the existence of any obligations under Section 6(d) presumes that the Agreements *are* enforceable, and that non-payment by another participant can be enforced by "mandamus, specific performance or other legal or equitable remedy." Here, non-Washington participants had no basis to obtain "mandamus, specific performance or other legal or equitable remedy" against the Washington public participants whose contracts were void *ab initio*. The court's finding that Section 6(d) did not require payment if the Agreements were unenforceable against a majority of participants was a perfectly reasonable—indeed, the most reasonable—interpretation of the provision.

Finally, Petitioners claim that the court created a new state doctrine requiring the bondholders to seek declaratory judgment or be barred from suing for payment. Nothing in the court's opinion even remotely suggests such a holding. Petitioners' argument appears to be based on the court's comment, in denying Petitioners' estoppel argument, that the bondholders could have sought declaratory judgment. 102 Wash. 2d at 905. That comment was not the basis for denying the estoppel claim; the estoppel claim was denied "because the representations relied upon were representations as to questions of law." 102

Wash. 2d at 095.[12]. In referring to the possibility of declaratory judgment, the court merely noted, *obiter dicta*, one precaution bondholders might have undertaken to protect themselves against the risk.[13]. Again, a reading of the Washington Supreme Court's opinion alone disposes of Petitioners' constitutional claims.

2. *The Washington Supreme Court Did Not Deny Petitioners Procedural Due Process.*

(a) The Washington Supreme Court Did Not Address Any Disputed Questions of Fact.

Petitioners allege that the Washington court's finding of lack of authority was based upon a factual determination that the participants did not exercise sufficient control over the projects to meet the ownership requirement imposed by Washington statutes. To support this allegation, Petitioners grossly mischaracterize the opinion, presenting quotations out of context as evidence that the court considered questions of fact, when the court's opinions emphasize that the finding of lack of control was based on legal interpretation of the Participants' Agreements.

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[12] Representations of legal authority do not give rise to estoppel. *Finch v. Mathews*, 74 Wash. 2d 161, 169-172, 443 P.2d 883 (1968). Rather, private parties dealing with a governmental agency are charged with notice of the agency's authority. *Noel v. Cole*, *supra*, 98 Wash. 2d at 379; *State, ex rel. Bain v. Clallam County Board of Commissioners*, 77 Wash. 2d 542, 463 P.2d 617 (1970).

As this Court has noted, in denying claims that municipalities can be estopped from denying a substantial lack of authority to issue bonds:

> Not only the courts, but individuals, are bound to know the law, and cannot be received to plead ignorance of it. The holder of the bonds in question can claim no indulgence on that score, and can take no advantage from the allegation that he is a bona fide purchaser without notice. . . Want of such authority is a fatal objection to their validity, no matter under what circumstances the holder may have obtained them.

Town of South Ottowa v. Perkins, 94 U.S. 260, 269 (1877).

[13] They might have taken other precautions also, such as procure insurance. If bondholders were ill-advised by attorneys or brokers that they would incur no risk, they may pursue their remedies against those advisors.

In phrasing the question of control to be examined, the court in *Chemical Bank I* stated that it would "examine the present agreement to determine whether the participants retained sufficient control over the project to constitute the equivalent of an ownership interest." 99 Wash. 2d at 787. Thus, the question as phrased considered only the Agreements. In answering this question the court relied only upon the Agreements:

> In the present case, *several provisions of the agreement* limit the participants' role in management to an extent inconsistent with control of any facilities acquired or constructed.

Id. (Emphasis added).

In *Chemical Bank II*, after permitting Chemical Bank to reargue the control issue, the court again emphasized that its ruling was based upon analysis of the Agreements. The court stated:

> We recognize that *the agreement* did supply some control but still disagree with the appellants' position that it was control sufficient to protect the interest of [the participants'] ratepayers as contemplated by [Washington] statutes.

102 Wash. 2d 893 (emphasis added). The court expressly rejected Petitioners' assertion that the existence of control was essentially a factual inquiry:

> Moreover, we reject appellants' assertion that the question of ownership control is essentially a factual inquiry. The Participants' Agreement and Pacific Power's Ownership Agreement create the contractual rights of the parties. Interpretation of those agreements is a question of law. *Kelly v. Aetna Casualty and Surety Co.*, 100 Wash. 2d 401, 670 P.2d 267 (1983).

102 Wash. 2d at 894.

It is clear from the court's opinions that it determined the existence of control according to the Participants' Agreements, and that there was no lack of opportunity to be heard on the legal issue of whether the agreements provided sufficient control.

Petitioners also assert that their estoppel claims were denied based on factual inquiry. However, the estoppel claims were denied because the representations relied upon by the bondholders were representations as to questions of law, not questions of fact. *See* Section 1, *supra*, at 15.

(b) Petitioners Were Not Denied an Impartial Tribunal.

These Respondents adopt and incorporate the discussion of this issue by the Nine Respondents and the Washington Public Utilities Group, which establish that Petitioners' assertions of partiality are baseless.

CONCLUSION

Petitioners cannot seriously contend that, if the Washington court correctly applied Washington law concerning *ultra vires* contracts and equitable remedies, they would have a constitutional claim. Rather, Petitioners' claim is and must be based on the assertion that the Washington Supreme Court suddenly and arbitrarily departed from clear precedent to redefine contract rights and remedies under state law. Even a cursory review of the Washington Supreme Court's opinions in *Chemical Bank I* and *Chemical Bank II* demonstrates that Petitioners' claims are based on mischaracterizations of those opinions.

Petitioners have strained to create even the appearance of constitutional issues in this case. However, a real constitutional controversy would be created if this Court were to grant certiorari to review state court decisions applying purely state law in determining contract or property rights. Such review would infringe on the powers of state courts and open the floodgates to wholly new categories of petitions for certiorari.

For these reasons the Oregon PUDs respectfully request that this petition for writ of certiorari be denied.

Respectfully submitted,

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